Supreme Court, U.S.
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JAN 9 1987
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(2)

No. 86-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN AIRLINES, INC., et al.,

Petitioners,

vs.

ROY E. DOOLEY, JR., et al.,

Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ELWYN RUSSELL WOODY, JR.*
RICHARD F. WATT
GEORGE W. TERRELL, JR.
One IBM Plaza—Suite 4750
Chicago, Illinois 60611
(312) 467-0590
Counsel for Respondents
**Counsel of Record*

Of Counsel
COTTON, WATT, JONES & KING
One IBM Plaza—Suite 4750
Chicago, Illinois 60611
(312) 467-0590

January 9, 1987

CHAS. P. YOUNG COMPANY

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are the following:

1. Whether the court of appeals, in reversing the district court's grant of summary judgment in favor of petitioners on Counts II, III, and IV of respondents' complaint, correctly determined that respondents raised disputed issues of material fact as to each count.

2. Whether the court of appeals correctly determined that the opinion of respondents' expert was sufficient to raise a material issue of fact as to the actuarial appropriateness of changing the interest assumption used to calculate the present value of a pension plan participant's benefit in the form of a lump-sum payment from an 8½% fixed rate to a variable rate based on the Moody's Aaa Corporate Bond Rate plus 1%.

LIST OF PARTIES

The list of parties in this case is the same as those in case No. 86-725. An accurate list is contained in the petition for certiorari in No. 86-725, though the list in the cross-petition omitted, apparently inadvertently, the names of the following respondents: Alvin O. Berg, Jr., E. G. Bielinski, John W. Blute, and Vincent R. Bradley; and wrongly included the name Alvin Bradley.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Roy E. Dooley, Jr., et al., respectfully request that this Court deny the cross-petition for writ of certiorari, seeking review of the judgment of the Seventh Circuit with respect to Counts II, III and IV of respondents' Third Amended Complaint. That judgment was entered on August 5, 1986, is reported at 797 F.2d 1447, and is reprinted in Appendix A to petitioners' cross-petition.

JURISDICTION

In addition to the bases for jurisdiction recited by petitioners, respondents brought this suit in the United States District Court for the Northern District of Illinois pursuant to 29 U.S.C. § 1132(e).

Petitioners' Cross-Petition for a Writ of Certiorari is untimely except for the provisions of Supreme Court Rule 19.5. Thus, unless the Court grants respondents' Petition for

a Writ of Certiorari in Case No. 86-725, it should deny the cross-petition, pursuant to Supreme Court Rule 20.5.

STATEMENT OF THE CASE

Respondents adopt and incorporate by this reference the Statement of the Case as set forth in their petition for certiorari in Case No. 86-725 at pages 2-9, with the following additions.

The Pilots, petitioners in Case No. 86-725 and respondents herein, seek review of the Seventh Circuit's affirmance of the district court's grant of summary judgment in favor of American (petitioners herein) as to Count I of the Pilots' amended complaint. American, in its cross-petition, seeks review of the Seventh Circuit's reversal and remand of the district court's grant of summary judgment in favor of American as to Counts II, III and IV of the amended complaint.

Count II alleged that the variable interest rate adopted by American was unreasonably high during the relevant period and resulted in lump-sum benefits which were less than actuarially equivalent to the annuities to which respondents were entitled, in violation of the vesting provisions of Section 203 of ERISA, 29 U.S.C. § 1053. Count III alleged that the change in interest assumption was motivated by petitioners' desire to secure for American the economic benefit of the reduced lump-sum payments, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A), which requires petitioners as Plan fiduciaries to discharge their duties solely in the interest of the participants and beneficiaries. Count IV sought injunctive relief against the wrongful conduct asserted in Counts I through III.

The court of appeals pointed out that Counts II and III are closely related and both turn upon whether the plan fiduciaries appropriately set the new, floating-rate interest factor, and concluded:

> In granting summary judgment in favor of the appellees on Counts II and III, the district judge apparently

> concluded that "[t]he defendants' action [in changing the interest assumption] served to insure actuarial equivalence." Order at 6. We believe that this factual finding was inappropriate given the summary judgment posture of this case.

797 F.2d at 1453, Appendix A to Cross-petition at A-11. Viewing the "entire record and the inferences drawn therefrom in the light most favorable to" the Pilots, the court of appeals found that the Pilots "were able to raise a material issue of fact regarding the actuarial appropriateness of setting the interest assumption at the 'Moody's + 1%' rate" through the statements of Carl Fischer, respondents' expert.

Respondents opposed the motion for summary judgment on Counts II, III and IV with, among other things, the affidavit of their expert witness, Professor Carl Fischer.[1]

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[1] Carl Fischer's expert qualifications are as follows (Fischer Affidavit, Dk. No. 106 at 2-4): Bachelor of Science Degree in Engineering from Washington University in 1923, a Master of Science Degree from the University of Iowa in 1930, and a Doctor of Philosophy Degree, also from the University of Iowa, in 1932. He is a Fellow of the Society of Actuaries, a Charter Member of the American Academy of Actuaries, a Fellow of the Conference of Actuaries in Public Practice, an Enrolled Actuary pursuant to Section 3042 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1242, a Member of the International Actuarial Association, and a member of various other professional organizations. He twice served as Vice President of the Conference of Actuaries in Public Practice (1970-72 and 1974-75), is a past Editor of the Journal of the Conference, and a former member of the governing boards of the Society of Actuaries, the Conference of Actuaries and the American Academy of Actuaries. Prior to assuming emeritus status in 1974, he had been a member of the faculty of the University of Michigan for 33 years, serving for approximately the last half of that period as Director of the Master of Actuarial Science Program.

Professor Fischer served as a consultant to the Treasury Department and the General Accounting Office, is a former member of the Advisory Council on Social Security Financing and, in 1960-61, served as Chairman and Director of the Study of the Military

(footnote continued on next page)

With respect to determining actuarial equivalence of lump sum distributions at issue in Counts II and III, Fischer stated:

> *Actuarial Equivalence of Lump Sum Distributions.* In my professional opinion, actuarial equivalence must be determined on the basis of reasonable actuarial assumptions, consistently applied, including a reasonable interest assumption. Reasonableness implies a range and there is, therefore, no single interest rate which, alone, constitutes the reasonable interest assumption for purposes of actuarial equivalence. In my opinion, during the period from February 1981, through September, 1982, during which most of the plaintiffs retired:
>
> (a) 8½% was, and continued to be, well within the range of reasonable interest assumptions for purposes of

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Retired Pay System for the Senate Committee on Armed Services. He has also been consulted by various state and local governments and has acted as consultant to the Government Services Insurance System and the Social Security System of the Republic of the Philippines, and to the National Social Security and Welfare Corporation of the Republic of Liberia.

Professor Fischer's publications include *Vesting and Termination Provisions in Private Pension Plans*, 1970; *The Mathematics of Life Insurance*, 1965; *Mathematics of Investment*, 1951; and approximately 45 articles in various professional and scholarly publications. He is presently active as a consultant to corporate and multi-employer pension plans and plan sponsors, and has had extensive experience as an expert consultant and witness in connection with litigation, having been retained in more than 50 cases. Most frequently, he has been consulted for the purpose of giving his opinion as to the present value of the accrued retirement benefits of parties to divorce or dissolution of marriage proceedings in connection with the disposition of property incident to such proceedings, a task involving the application of actuarial interest and mortality assumptions and the making of computations similar to those entailed in the determination of the actuarial equivalence of optional forms of retirement benefits.

determining the actuarial equivalence of lump sum distributions.

(b) The highest reasonable interest rate for purposes of determining actuarial equivalence of lump sum distributions was the rate promulgated by the Pension Benefit Guaranty Corporation for valuing immediate annuities, which rate, during the period in question, ranged from a low of 9¾% to a high of 11%.

(c) During a period of high volatility in market rates of interest, a variable interest rate, indexed to a standard intended to reflect current market rates of interest, with no provision for eliminating the extremes of the fluctuations through averaging or some other technique, does not provide a reasonable interest assumption for purposes of determining the actuarial equivalence of lump sum distributions.

(d) A variable interest rate, one percentage point greater than the Moody's Aaa Corporate Bond Rate for the third month prior to retirement, was not, during the period in question, a reasonable basis for determining actuarial equivalence of lump sum distributions under the American Plan.

Dk. No. 106, at 33-34.

Fischer's opinion was in direct conflict with that of petitioners' expert, Willard Hartman.

REASONS FOR DENYING THE WRIT

The Court Of Appeals Properly Reversed The District Court's Grant Of Summary Judgment In Petitioners' Favor On Counts II, III And IV Because There Are Disputed Issues Of Material Facts As To Each Count

The cross-petition for certiorari involves a garden variety summary judgment ruling in which the court of appeals stated the obvious: where there is conflicting expert testimony on a material issue of fact, summary judgment is not

appropriate. The district court ignored the genuine dispute on material issues of fact when it granted summary judgment to petitioners on Counts II, III and IV of respondents' third amended complaint. In so doing, that court erred. Even assuming that the change in assumption involved no violation of ERISA Section 204(g) as alleged in Count I, the questions remain under Count II whether the new interest assumption was reasonable and, under Count III, whether the change was motivated by an objective in conflict with defendants' fiduciary obligations under Section 404(a)(1) of ERISA. Both those questions involve numerous disputed issues of fact. Since none of these questions was considered by the trial court, reversal was required.

The Cross-petition really comes down to the contention that the court of appeals erred on the merits. Petitioners do not suggest that the Seventh Circuit's decision with respect to Counts II, III or IV presents any federal statutory or constitutional question of especial importance. Nor do petitioners claim that there is any conflict in lower court decisions as to the standards for finding a genuine issue of material fact based on disputes between experts' testimony which this Court should resolve. Petitioners contend merely that the court of appeals applied an improper standard of review and that, under the proper standard, the district court's decision should have been affirmed. Contrary to petitioners' contention, however, the Seventh Circuit applied the correct standard of review in reversing the grant of summary judgment on Counts II, III and IV. In short, as to its ruling reversing the grant of summary judgment on those counts, the Seventh Circuit made no error and there is nothing in that part of the court's decision which invites the review of this Court.

I.

On Count II, There Is A Disputed Issue Of Material Fact As To Whether The New Variable Interest Rate Adopted By Petitioners Was Unreasonably High During The Relevant Time Period And Resulted In Lump-Sum Benefits Which Were Less Than Actuarially Equivalent To The Annuities To Which Respondents Were Entitled, In Violation Of The Vesting Provisions Of Section 203 Of ERISA, 29 U.S.C. § 1053

A. The Court of Appeals Utilized the Proper Standard of Review in Reversing the District Court's Grant of Summary Judgment on Count II.

Petitioners argue that the standard to be applied in reviewing their conduct in changing the actuarial assumptions in this case, in connection with Count II of respondents' amended complaint, is whether they acted arbitrarily or capriciously. They cite, in support of that contention, numerous cases involving issues of plan interpretation by the responsible fiduciaries. Building on that premise, they assert that they acted reasonably in relying on expert actuarial advice and conclude by citing decisions standing for the proposition that summary judgment is appropriate in cases involving issues of plan interpretation, applying the arbitrary and capricious standard. In the course of their argument, petitioners attempt to gloss over the irreconcilable conflict between the views of the parties' experts on the question of actuarial equivalence. But, since petitioners' initial premise concerning the standard of review is erroneous, their entire argument must fall.

(1) The Issue Under Count II Is Not Whether Petitioners Properly Interpreted the Plan Provisions Permitting Them to Change Interest Assumptions Or Whether They Acted Properly In Exercising Discretion Conferred Upon Them Under the Plan; the Question Is Whether, In Changing the Interest Assumptions, Petitioners Violated ERISA. Accordingly, the Arbitrary and Capricious Standard Does Not Apply.

Count II of the amended complaint alleges, in substance, that, as a result of the change in interest assumption, the lump sum benefits respondents received were not actuarially equivalent to their Basic Retirement Annuities, and that, by failing to provide actuarially equivalent lump sum benefits, petitioners have violated Section 203 of ERISA. Petitioners, claiming that "respondents have confused the 'nonforfeitability' requirement of ERISA with the prohibition of § 204(g) against a reduction of accrued benefits" (referring the Court to *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552 (D.C. Cir.) *cert. denied*, 469 U.S. 834 (1984), for "a concise explanation of the difference between these two concepts"), contend that Section 203 is irrelevant to plaintiffs' claims under Count II. (Cross-Petition at 22.)

It is petitioners who are confused. Very early after passage of ERISA, the IRS took the position under Section 411(a) of the Code, the Code provision corresponding to Section 203 of ERISA, that excessive actuarial reductions cause benefits to be forfeitable:

> IRC Section 411(a) provides that certain benefits must be nonforfeitable. IRC Section 411(a)(3) provides certain specific instances where forfeitures will not violate this nonforfeitability requirement. No exception is provided for a forfeiture due to excessive actuarial reduction. Except in the case of certain joint and survivor benefits, *a plan therefore cannot provide options or early retirement benefits that are less than an actuarial equivalent* [of the normal retirement benefit]. (Tech., Inf. Rel. No. 1403,

> Sept. 17, 1975, Q&A. V-13, reprinted in CCH Pen. Plan Guide ¶ 17,443 at 20,953, 20,956.) (Emphasis added.)

This position was adopted in Regulations Section 1.411(a)-4(a):[2]

> (a) *Nonforfeitability.* Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of Section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of Section 411 and regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right, is a forefeitable right at that time. *Certain adjustments to plan benefits, such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable. . . .* (Emphasis added.)

This Regulation, like others issued by the IRS under Section 411 of the Code are authoritative as to the interpretation of the corresponding vesting provisions in Section 203 of ERISA.[3]

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[2] Adopted August 22, 1977. Treas. Dec. 7501.

[3] While these regulations are promulgated by the IRS under Section 411 of the code, they are made expressly applicable to the corresponding labor law provisions incorporated in Section 203 of ERISA. (ERISA § 3002(c), 29 U.S.C. § 1202(c)).

These regulations are legislative in character, being promulgated pursuant to specific Congressional delegation of authority, and are accordingly binding on the courts unless they exceed the authority of the IRS or are arbitrary or capricious or constitute an abuse of discretion. *Baker v. Otis Elevator Company*, 609 F.2d 686 (3d Cir. 1979). A court is not free to set aside regulations of this character "simply because it would have interpreted the statute in

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Thus, if respondents' lump sums are not at least actuarially equivalent to their Basic Retirement Annuities as alleged in Count II, petitioners have violated Section 203. Where plan fiduciaries engage in conduct which is violative of the law, or where their decisions involve erroneous interpretations of statutory requirements, plaintiffs are not required to show in addition that their actions or decisions are arbitrary or capricious. The correct standard is stated in *Wolfe v. J.C. Penney Co., Inc.* 710 F.2d 388, 393 (7th Cir. 1983):

> A decision to deny benefits under a plan covered by ERISA will be overturned when "(1) arbitrary and capricious, (2) not supported by substantial evidence, *or (3) erroneous on a question of law.*" [Citation and footnote omitted.] (Emphasis added.)

This is not a case in which plaintiffs (respondents herein) and the plan fiduciaries differ as to the proper interpretation of a provision of the Plan, such as the cases relied on by Petitioners. There is no doubt that the Plan provision in question permits the plan administrator to alter actuarial assumptions at will.

In exercising their undoubted discretion under the Plan, petitioners, insofar as Count II is concerned, are subject to the prohibitions of Section 203 against forfeitures of vested benefits. Thus, if the actuarial assumptions adopted by petitioners result in optional benefits which are less than actuarially equivalent, petitioners have violated the Section 203 vesting standards. In that case, the assumptions adopted by petitioners cannot stand, regardless of whether or not they acted arbitrarily in adopting them.

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a different manner"; the regulations must be sustained unless they bear no relationship to the governing statutory section or tend to defeat the purpose of the statutory scheme. *Batterton v. Francis*, 432 U.S. 416, 425-26, 428 (1977); *Baker v. Otis Elevator Company*, 609 F.2d 686, 691-92 (3d Cir. 1979). The regulations in question are fully consistent with the statutory purpose.

(2) There is a Dispute on a Material Issue of Fact As to Whether the Lump-Sum Benefits Respondents Received Are Actuarially Equivalent To Their Basic Retirement Annuities.

In his affidavit in support of the Pilots' motion for partial summary judgment, Professor Fischer, stated flatly, that, in his opinion, lump-sum benefits computed on the basis of an 8½% interest assumption were actuarially equivalent during the relevant time period and that the assumption used by defendants to compute plaintiffs' lump sums was unreasonably high so that the distributions received were not actuarially equivalent to their basic retirement annuities. (Dk. No. 106, pp. 33-34.) Not only was the rate used too high, it exceeded the highest reasonable rate by 30% to 40%, and even more at the interest rate peak in the fall of 1981. (*Id.*) The change was implemented in a discriminatory fashion, without any cogent justification, except the maximization of the economic benefit to defendant American. *Id.* at 17-26, 34-35; *See* Petition for Certiorari in No. 86-725 at 8-9.

Thus, there is a classic conflict in the evidence on the critical question whether the lump sum benefits plaintiffs received are actuarially equivalent to their Basic Retirement Annuities. That conflict cannot be resolved by summary judgment. None of the cases cited by defendants to justify summary judgment (Cross-petition at 20) involved conflicting actuarial evidence such as is present here.[4]

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[4] In *Czyz v. General Pension Board, Bethlehem Steel Corporation*, 578 F.Supp. 126 (W.D. Pa. 1983), relied on by petitioners (Cross-petition at 21), there was a dispute as to the proper meaning of the term "good health" as it appeared in the plan. No violation of ERISA was claimed by plaintiff, and plaintiff conceded the applicability of the arbitrary and capricious standard. Accordingly, since there was substantial evidence, including independent medical advice secured by the trustees, supporting the trustees' interpretation, plaintiff's competing medical evidence did not give rise to a material issue of fact. Here, the arbitrary and capricious standard does not apply and resolution of the conflicting actuarial

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B. The Affidavit of Carl Fischer, Respondents' Actuarial Expert, Was Admissible Evidence Under Federal Rule of Civil Procedure 56(e); Fischer Qualifies As an Expert Under Federal Rule of Evidence 702; and His Expert Opinion Creates a Disputed Issue of Material Fact Sufficient to Defeat Petitioners' Motion For Summary Judgment.

Petitioners rely upon *Zenith Radio Corporation v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1125, 1139 (E.D. Pa. 1980), *aff'd in part and rev'd in part on other grounds, In re Japanese Electronic Products*, 723 F.2d 238 (3rd Cir. 1983), *rev'd on other grounds, Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ____, 106 S.Ct. 1348 (1986), for the proposition that inadmissible expert testimony cannot be relied upon in making a Rule 56 determination. The district court in *Zenith*, in a series of three opinions covering over 250 pages in volume 505 of the Federal Supplement, ruled on a plethora of evidentiary matters, primarily having to do with the admissibility of documentary evidence under the hearsay exceptions in Federal Rule of Evidence 803. Only the third opinion, beginning on page 1313, dealt, in part, with the admissibility of certain expert testimony. However, that case is not relevant to the issue raised by petitioners in their cross-petition, because, in *Zenith*, there was "no challenge to the professional qualifications of the experts." 505 F.Supp. at 1331 n. 18. The decisions of the court of appeals and of this Court in *Zenith* did not address the question of whether the experts were qualified to render an opinion on a material issue in the case, and are, thus, inapplicable here.

Likewise, the only other case cited by petitioners in support of their contention that Fischer was unqualified to render an opinion on the material issue, *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 671-73 (D.C. Cir. 1977), is inapposite. The court held that, where an expert's opinion is

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evidence is critical to the determination whether petitioners have violated Section 203.

based wholly on unsupported assumptions, "speculations and hypotheses and is unsubstantiated by *any* evidence in the record" and is in fact contradicted by the evidence in the record, plaintiffs had "failed to submit any credible evidence that they suffered individual injury as a proximate result" of the conduct of the defendants complained of in the complaint. Thus, summary judgment was appropriate. The expert testimony presented by respondents' expert, Carl Fischer, is much different.

Petitioners assert that Professor Fischer's testimony that he did not regard himself as an expert on market rates of interest requires that his testimony be disregarded. All that Professor Fischer stated was that he would rely on financial experts to recommend an appropriate index rate if one were to be used to reflect current market rates. The question here, however, is actuarial equivalence, not how one best measures market rates. Fischer's expert opinion is that the Moody's + 1% rate, or any other rate based solely on current market rates of interest, which does not provide for eliminating the extremes of fluctuations during periods of high volatility in market rates of interest through averaging or some other technique (*see e.g.*, Dep. of Kenneth Polk, January 12, 1983, at 134-35) and which results in interest rates in excess of the published PBGC rates for valuing annuities, does not provide a reasonable interest assumption for purposes of determining the actuarial equivalence of lump sum distributions. The fact that Fischer is not an expert on current market rates of interest does not undermine his opinion on whether the Moody's + 1% rate is actuarially equivalent to the normal retirement annuity. And, it certainly does not render his testimony "inadmissible".

It is noteworthy that both Mr. Polk, the Plan actuary at the time of the change in assumption, and Mr. Hartman, petitioner's expert, completely wash their hands of responsibility for selecting the Moody's + 1% interest rate, leaving that to the judgment of respondent American. (Deposition of Ken E. Polk, 57-58, 117-18, 130-32; Deposition of Willard A.

Hartman, 62-72). This testimony also belies defendants' claims that they relied on expert actuarial advice in changing the assumption.

II.

Under Count III There Are Substantial Disputed Issues Of Material Fact On Whether Petitioners, In Adopting The Variable Interest Assumption, Violated Their Fiduciary Duties Under ERISA Section 404(a).

Petitioners attempt to counter the court of appeals' reversal of the grant of summary judgment as to Count III essentially on the grounds that they have denied improper motivation.

The issue on Count III is whether or not petitioners' change in the interest assumption was motivated by the desire to reduce American's pension contributions. Motivation is peculiarly a question of fact, ordinarily to be shown indirectly, by inferences, rather than direct admissions of wrongdoing. Respondents believe that the following facts, among others, and the inferences reasonably drawn from them, demonstrate the existence of material issues:

> The fact that, under all the circumstances, the *sole* effect of the change in assumption was to take money from respondents and give it to petitioner American through the reduction of respondents' lump-sum distributions and the operation of the actuarial cost method. (Dk. No. 106, Affidavit of Fischer.)
>
> The fact that the purposes for which petitioners claim they implemented the change are not accomplished or even materially furthered by it. (*Id.*)
>
> The fact that the change in assumption could have been implemented in a nondiscriminatory manner, albeit with reduced economic benefit to American, and petitioners chose a mode of implementation which maximized the benefit to American while discriminating against respondents and similarly-situated Plan participants. (*Id.* at 17-26, 34-35.)

The fact that the interest assumption was changed only with respect to the lump sum, and not with respect to any other optional form. (Deposition of Ken E. Polk, January 12, 1983, pp. 66-77, Dk. No. 117; Exhibit 23 to Deposition of T. F. Quinn, January 13, 1983.)

The fact that petitioner Quinn denied having discussed the impact of the change in interest assumption on American's contributions prior to its implementation, whereas Mr. Polk, then the consulting actuary for the Plan, testified at his deposition that that matter was discussed in advance. (*Compare*, Deposition of Ken E. Polk, January 12, 1983, pp. 141-42, Dk. No. 117, *with* Deposition of T. F. Quinn, January 13, 1983, pp. 24-26.)

The fact that Donald J. Lloyd-Jones, then Senior Vice President for Operations of American, told respondent Dooley in a conversation in early 1981 that lump sum distributions to pilots were going to be discounted at whatever rate American had to pay when borrowing money. (Deposition of Roy E. Dooley, Jr., December 5, 1983, pp. 27-28, 43-45.)

III.

The Court Of Appeals Properly Reversed The Grant Of Summary Judgment On Count IV Since That Count, Seeking Injunctive Relief Against The Conduct Which Forms The Basis Of Counts I, II, And III, Is Closely Related To And, In Part, Derivative Of Counts II And III.

The court of appeals pointed out, and petitioners apparently agree, (*see*, Cross-petition at 25), that Count IV hinges on the success or failure of Counts I, II and III. Since summary judgment was inappropriate as to Counts II and III, it was inappropriate as to Count IV as well. Thus, if the court of appeals was correct in reversing the grant of summary judgment as to either or both of Counts II and III, it was correct in reversing the grant of summary judgment as to Count IV.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

Elwyn Russell Woody, Jr.*
Richard F. Watt
George W. Terrell, Jr.
One IBM Plaza—Suite 4750
Chicago, Illinois 60611
(312) 467-0590
Counsel for Respondents

By: _____
*Counsel of Record for Respondents

Of Counsel:
COTTON, WATT, JONES & KING
One IBM Plaza—Suite 4750
Chicago, Illinois 60611
(312) 467-0590

Dated: January 9, 1987